IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 430

JAMES SAILORS and LORETTA SAILORS; SEYMOUR KONING and MILDRED KONING; GRAZZI MULLAY and ROSALIE MULLAY and THE BOARD OF EDUCATION OF THE CITY OF GRAND RAPIDS, a second class school district; and WILLIAM A. DUTHLER and ANNA M. DUTHLER; HARVEY A. DUTHLER and EDNA M. DUTHLER;

APPELLANTS.

vs.

THE BOARD OF EDUCATION OF THE COUNTY OF KENT, and VICTOR WELLER, DEWEY JAARSMA, MARY I. KEELER, RUSSELL EMMONS and C. B. LEAVER, as members thereof; KENTWOOD PUBLIC SCHOOLS, a fourth class school district, and THE ATTORNEY GENERAL OF THE STATE OF MICHIGAN;

APPELLEES.

On Appeal from the United States District Court for the Western District of Michigan, Southern Division

MOTION TO DISMISS OR AFFIRM

ROBERT A. DERENGOSKI
Solicitor General of the State of Michigan on Behalf of Appellee Frank J. Kelley, Attorney General of the State of Michigan
The Capitol
Lansing, Michigan 48902

EUGENE KRASICKY
Assistant Attorney General on Behalf of Appellee Frank J. Kelley, Attorney General of the State of Michigan
The Capitol
Lansing, Michigan 48902

PAUL O. STRAWHECKER
Attorney for Appellee Kentwood Public Schools
740 Old Kent Building
One Vandenberg Center
Grand Rapids, Michigan 49502

GEORGE R. COOK
Attorney for Appellee Board of Education of the County of Kent and the Individual Appellees
Suite 111-C, Waters Building
Grand Rapids, Michigan 49502

AMERICAN BRIEF AND RECORD COMPANY, FIFTY MARKET AVENUE, N.W., GRAND RAPIDS, MICHIGAN 49503 — PHONE GL 2-5526

SUBJECT INDEX

APPENDICES

TABLE OF CASES CITED

TABLE OF CASES CITED (CONT'D)

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED (CONT'D)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 430

JAMES SAILORS and LORETTA SAILORS; SEYMOUR KONING and MILDRED KONING; GRAZZI MULLAY and ROSALIE MULLAY and THE BOARD OF EDUCATION OF THE CITY OF GRAND RAPIDS, a second class school district; and WILLIAM A. DUTHLER and ANNA M. DUTHLER; HARVEY A. DUTHLER and EDNA M. DUTHLER;

APPELLANTS,

vs.

THE BOARD OF EDUCATION OF THE COUNTY OF KENT, and VICTOR WELLER, DEWEY JAARSMA, MARY I. KEELER, RUSSELL EMMONS and C. B. LEAVER, as members thereof; KENTWOOD PUBLIC SCHOOLS, a fourth class school district, and THE ATTORNEY GENERAL OF THE STATE OF MICHIGAN;

APPELLEES.

On Appeal from the United States District Court for the Western District of Michigan, Southern Division

---

MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16, paragraph 1(c) of the Rules of this Court, move that the appeal be dismissed, or, alternatively, that the judgment of the District Court be affirmed on the grounds that appellants, whether corporate or individual, have no standing to invoke the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, and it is manifest that the question on which the decision of the cause depends is so unsubstantial as not to need further argument.

MICHIGAN CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Pertinent Michigan constitutional provisions (1908 and 1963) relating to education are set forth in Appendix C, *infra*, at pages 29b and 30b.

The powers and duties of a county (intermediate) board of education, as provided by § 297 of The School Code of 1955, as amended (CL 1948, § 340.297; MSA § 15.3297) are set forth in Exhibit 1, attached to Appendix A, *infra*, at pages 18b-21b.

The powers and duties of a board of education of a county (intermediate) school district, as provided by § 298a of The School Code of 1955, as added by Act No. 190 PA 1962, effective March 28, 1963 [CL 1948, § 340.298a; MSA 15.3298 (1)], are set forth in Exhibit 3, attached to Appendix A, *infra*, at pages 21b-25b.

Extracts from the Michigan statutory provisions with reference to the transfer of territory between school districts and the qualifications of school electors are set forth in Appendices D and E, respectively, *infra*, pp. 31b-34b.

QUESTIONS PRESENTED BY THIS MOTION TO DISMISS OR AFFIRM

The questions presented by this motion of appellees to dismiss or affirm are the following:

1. Does appellant The Board of Education of the City of Grand Rapids, as a municipal corporation, have privileges or immunities under the Federal Constitution which it may invoke against its creator?

2. Does the Michigan statute which provides for the election of members of the county (intermediate) board of education by vote of a body composed of 1 member of the board of education of each constituent school district, who shall be designated by the board of education (pop-

ularly elected by school electors) of the constituent school district of which he is a member, deny the equal protection of the laws to the individual appellants where neither the Michigan Constitution nor any State statute confers a vote upon them for the office of member of the county (intermediate) board of education, and does such question present a substantial Federal question for determination by this Court?

STATEMENT OF THE CASE

Appellee Kentwood Public Schools was created July 1, 1958, by the consolidation of 6 elementary school districts, to provide kindergarten through 12th grade education (App. A, *infra*, p. 3b).

Prior to the political annexation and transfer of territory, which triggered this litigation, there had been 9 detachments of territory from Kentwood Public Schools by political annexations to the City of Grand Rapids under the Home Rule Act (§ 6, Act No. 279 of the Public Acts of 1909, as amended; 1948 Compiled Laws of Michigan, § 117.6; Michigan Statutes Annotated, § 5.2085), which territory, so politically annexed, became a part of appellant school district, without a vote of the school electors of appellee Kentwood Public Schools, by virtue of § 143 of The School Code of 1955 (CL 1948, § 340.143; MSA § 15.3143) which provided:

> "Whenever territory shall be annexed to a city comprising a school district of the second class, such territory, by such annexation, shall become and be part of the school district of that city."

From 1958 through December 31, 1962, there were 35 political annexations of territory to the City of Grand Rapids, which territory became a part of appellant school district, by operation of law (App. A, *infra*, pp. 3b-4b).

The 4 areas involved in this litigation comprised territory which became part of the Kentwood school district on consolidation July 1, 1958. These 4 areas, with a 1964

state equalized valuation for tax purposes of $5,370,000, and upon which stood a modern, 14-classroom elementary school, were politically annexed to the City of Grand Rapids under the Home Rule Act, effective December 31, 1962 (App. A, *infra*, pp. 5b and 13b).

The 1962 Michigan Legislature repealed § 143 of The School Code by Act No. 171 PA 1962, and was approved by the Governor May 17, 1962. However, as the act was not given immediate effect, it did not take effect until March 28, 1963 (App. A, *infra*, p. 4b).

Because the repeal of § 143 did not save these 4 areas from becoming a part of appellant The Board of Education of the City of Grand Rapids, the Board of Education of Kentwood Public Schools on January 1, 1963, by proper resolutions, requested appellee the Board of Education of the County of Kent to transfer these 4 areas back to Kentwood Public Schools, under the transfer provisions of chapter 5, part 2, of The School Code (CL 1948, § 340.461, et seq; MSA § 15.3461, et seq), extracts from which are set forth in Appendix D, *infra*, pp. 31b and 32b. See Appendix A, *infra*, p. 6b.

Appellee the Kent County Board of Education held extensive hearings on the request and, at the final hearing February 6, 1963, it was publicly announced by the president of the county board of education that a decision would be rendered February 25, 1963 (App. A, *infra*, pp. 6b and 7b).

February 15, 1963, appellants James Sailors and Loretta Sailors, Seymour Koning and Mildred Koning, Grazzi Mullay and Rosalie Mullay, the original individual plaintiffs, and appellant The Board of Education of the City of Grand Rapids filed the complaint herein seeking to enjoin the county board of education from acting on the requested transfer, to declare the county board unconstitutionally constituted, to enjoin further elections until the malapportionment was brought into balance, and to declare the absence of any statutory standards governing the decisions of the county board violative of due process and an improper delegation of legislative authority. On filing the complaint Chief District Judge Wallace Kent en-

tered an ex parte order restraining the county board from assuming jurisdiction of the requested transfer and from rendering a decision thereon (App. A, *infra*, p. 8b).

In the afternoon of February 25, 1963, on motion of Kentwood Public Schools, Judge Kent revoked the temporary restraining order, without prejudice to renew. That evening the county board adopted a resolution transferring the 4 areas from appellant The Board of Education of the City of Grand Rapids to appellee Kentwood Public Schools (App. A, *infra*, p. 8b). The complaint was then amended to set aside the transfer.

A three-judge court was constituted to hear appellants' complaint and by order entered March 4, 1963, denied the motion of appellants to reinstate the restraining order and likewise denied their application for an interlocutory injunction at that time. Appellees' motions to dismiss the complaint were held in abeyance and the Court retained its jurisdiction "awaiting the plaintiffs' exercise of their administrative remedies provided by the Michigan Statutes, and, if they so choose, their application to the Supreme Court of Michigan for writ of certiorari to review the action of the state board of education" (App. A, *infra*, p. 12b).

Appellants (the original plaintiffs) appealed the order of transfer to the State Board of Education, pursuant to § 467 of The School Code of 1955, as amended (CL 1948, § 340.467; MSA § 15.3467), which section is set forth in Appendix D, *infra*, pp. 31b and 32b. See Appendix A, *infra*, p. 12b.

The State Board of Education, which has never been made a party to this litigation, was constituted by § 6, Article XI of the 1908 Constitution, the 4 members of which were elected at large by the people of the State (App. A, *infra*, p. 12b). This section is set forth in Appendix C, *infra*, p. 29b.

June 5, 1963, the State Board of Education entered an order setting aside the action of appellee the Board of Education of the County of Kent taken February 25, 1963, and ordered that the territory involved be transferred from appellant The Board of Education of the City of

Grand Rapids to appellee Kentwood Public Schools, except for the property owned and occupied by the original individual plaintiffs, appellants James Sailors and Loretta Sailors; Seymour Koning and Mildred Koning; Grazzi Mullay and Rosalie Mullay and two other lots owned by others (App. A, *infra*, pp. 12b and 13b).

Application to the Supreme Court of Michigan for leave to appeal the order of the State Board of Education was not made and the order of the State Board of Education has become final (App. A, *infra*, p. 14b).

Appellants William A. Duthler and Anna M. Duthler; Harvey A. Duthler and Edna Duthler intervened as parties plaintiff by order entered June 4, 1964 (App. A, *infra*, p. 13b). These appellants are school electors of Kentwood Public Schools (App. A. *infra*, p. 13b). The original individual plaintiffs, James Sailors and Loretta Sailors; Seymour Koning and Mildred Koning; Grazzi Mullay and Rosalie Mullay, are school electors of appellant school district and not of Kentwood, by reason of the order of the State Board of Education (App. A, *infra*, pp. 12b and 13b).

After filing the Stipulation of Facts May 3, 1965 (App. A, *infra*, pp. 1b through 25b) and the issues of law as filed by both appellants and appellees [see the Issues of Law Agreed to by Defendants (appellees), App. B, *infra*, pp. 26b through 28b], the three-judge court heard the case on the merits August 25, 1965.

The opinions (254 F Supp 17; Jurisdictional Statement Appendices A and B, pp. 1a through 23a) were filed May 2, 1966, and the order dismissing the complaint, as amended, (Jurisdictional Statement App. C, pp. 24a and 25a) was entered May 2, 1966.

ARGUMENT

I

Appellant The Board of Education of the City of Grand Rapids, as a municipal corporation, has no privileges or immunities under the Federal Constitution which it may invoke against its creator and has no standing on this appeal

Appellant The Board of Education of the City of Grand Rapids is a school district of the second class, organized and existing under the provisions of chapter 5, part 1 of The School Code of 1955, as amended (CL 1948, § 340.141, et seq; MSA § 15.3141, et seq) and is a municipal corporation (*Attorney General ex rel McRae v Thompson*, 168 Mich 511, 134 NW 722), created by the State of Michigan for the better ordering of education in the State, and, as such, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of the State.

In *Williams v Baltimore*, 289 US 36, 77 L ed 1015, 53 S Ct 431, where the question was squarely raised, the General Assembly of Maryland adopted a statute exempting the property of a particular railroad from taxation. The mayor and City Council of Baltimore, and the mayor, counselor and aldermen of the City of Annapolis, municipal corporations, challenged the statute as invalid under the Fourteenth Amendment to the Constitution of the United States.

Mr. Justice Cardozo, in delivering the unanimous opinion of the court, disposed of this question in 2 one sentence paragraphs as follows (289 US 40, 77 L ed 1020, 53 S Ct 432):

> "1. There is error in the holding of the Circuit Court of Appeals that the statute of Maryland creating this exemption is a denial to the respondents of the equal protection of the laws in violation of the

Fourteenth Amendment of the Constitution of the United States.

> "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator. (Citing cases)."

Coleman v Miller, 307 US 433, 441, 83 L ed 1385, 1390, 59 S Ct 972, 976; *City of Houston v State*, 142 Tex 190, 176 SW 2d 928, appeal dismissed for want of substantial federal question, citing *Williams*, 322 US 711, 88 L ed 1554, 64 S Ct 1159.

In *Lansing District v State Board of Education*, 367 Mich 591, 116 NW 2d 866, Mr. Justice Kavanagh, writing for a unanimous Court, held (367 Mich 600, 116 NW 2d 870):

> "We do not believe plaintiff (The School District of the City of Lansing) is a proper party to raise the question of whether or not its residents have the right to vote on the transfer. This right, if existing at all, would exist in the voters and not in the school district. Plaintiff school district is an agency of the State government and is not in a position to attempt to attack its parent. The question of how and where individuals would vote is a question between the individuals themselves and the government."

Title 42 United States Code § 1983 grants a civil action for the deprivation of rights to "every person". *Monroe v Pape*, 365 US 167, 191, 5 L ed 2d 492, 507, 81 S Ct 473, 486, squarely holds that a municipal corporation is not a "person" within the meaning of § 1983. See also *Egan v City of Aurora*, 365 US 514, 5 L ed 2d 741, 81 S Ct 684.

District Judge Fox, in his dissenting opinion, correctly recognized this lack of standing on the part of appellant The Board of Education of the City of Grand Rapids, when he said (254 F Supp 27; Jurisdictional Statement, Appendix B, p. 20a):

"The rights involved in this case being voting rights, and as such, personal, plaintiff Board of Education of the City of Grand Rapids and intervening plaintiff City of Grand Rapids are held to have insufficient standing to remain as parties to this action."(1)

Clearly, appellant The Board of Education of the City of Grand Rapids has no standing on this appeal and should be dropped as an appellant.

II

The question presented on this appeal (Jurisdictional Statement, page 3) is so unsubstantial as not to need further argument

The one-man one-vote doctrine, enunciated in *Reynolds v. Sims*, 377 US 533, 12 L ed 2d 506, 84 S Ct 1362, assumes that the one man has a constitutional or statutory absolute right to vote. Appellees contend that the individual appellants had and have no absolute right to vote for members of a Michigan county (intermediate) board of education, under the Constitution and laws of the State as historically interpreted and construed by the Supreme Court of Michigan.

(a) Historically in Michigan it has never been considered that the qualifications of school electors must be identical with those prescribed for general electors in the Constitution

In *Belles v Burr*, 76 Mich 1, 43 NW 24, it was held (76 Mich 11, 43 NW 28):

"Viewing the questions historically, it is apparent that for 50 years it has never been considered that the qualifications of voters at school-district meetings must be identical with those prescribed in the Con-

(1) The City of Grand Rapids is not a party to this appeal.

stitution as qualifications of electors entitled to vote under that instrument. The authority granted by the Constitution to the Legislature to establish a common or primary school system carried with it the authority to prescribe what officers should be chosen to conduct the affairs of the school-districts, to define their powers and duties, their term of office, *and how and by whom they should be chosen* (emphasis supplied).

"School-districts are regarded as municipal corporations. *School-district v Gage*, 39 Mich 484; *Seeley v Board of Education*, Id. 486. As such they preceded the Constitution (*Stuart v School-district*, 30 Mich. 69), and were recognized by that instrument (Const. 1835, Art. 10, § 3; Const. 1850, Art. 13, § 5). But no officer of the school-district is mentioned or recognized by that instrument. The reason is that the whole primary school system was confided to the Legislature, and it cannot be said that the officers of school-districts, chosen pursuant to the system adopted by the Legislature, are constitutional officers. The Constitution provided for no municipal subdivisions smaller than towns, except cities and villages, and it authorized the Legislature to incorporate these. Const. 1850, Art. 15, § 13."

After 127 years it has never been considered that the qualifications of Michigan school electors "must be identical with those prescribed in the Constitution as qualifications of electors entitled to vote under that instrument".

Although since 1951 (Act No. 257 PA 1951), the qualifications of Michigan school electors have been the same as those prescribed by the Constitutions of 1908 and 1963, such qualifications have been prescribed by the school code and not by the Constitutions. See Appendix E, *infra*, pp. 33b-34b, for the qualifications of school electors found in the school code under the Michigan Constitutions of 1908 and 1963.

The rule of *Belles, supra*, has always been the law of Michigan.

(b) Education in Michigan belongs to the State. It is no part of the local self-government inherent in the township or municipality except so far as the Legislature may choose to make it such

In *Attorney General v Detroit Board of Education*, 154 Mich 584, 118 NW 606, the Supreme Court quoted with approval the opinion of the judges of the Wayne County Circuit Court, which, in part, was as follows (154 Mich 590, 118 NW 609):

> "Education in Michigan belongs to the State. It is no part of the local self-government inherent in the township or municipality, except so far as the Legislature may choose to make it such. The Constitution has turned the whole subject over to the Legislature. *Belles v Burr*, 76 Mich 1."

We quote from *MacQueen v Port Huron City Commission*, 194 Mich 328, 160 NW 627, as follows (194 Mich 336, 160 NW 629):

> "Fundamentally, provision for and control of our public school system is a State matter, delegated to and lodged in the State legislature by the Constitution in a separate article entirely distinct from that relating to local government. The general policy of the State has been to retain control of its school system, to be administered throughout the State under State laws by local State agencies organized with plenary powers independent of the local government with which, by location and geographical boundaries, they are necessarily closely associated and to a greater or less extent authorized to cooperate. Education belongs to the State. It is no part of the local self-government inherent in the township or municipality except so far as the legislature may choose to make it such. *Belles v Burr*, 76 Mich 1 (43 NW 24); *Attorney General v Board of Education*, 154 Mich 584 (118 NW 606). The general school laws were carefully planned and enacted to guard that distinction;

provision was made for organization of the common school districts, with officers elected at school meetings by electors with defined qualifications, and who as a school board were given large plenary powers and control of school matters, practically independent from the local government of municipalities in which the schools were situated."

Ruppert v Township School District, 252 Mich 482, 233 NW 387, quoting from *MacQueen, supra*, at page 336 (252 Mich 486-7, 233 NW 389); *Jones v Grand Ledge Public Schools*, 349 Mich 1, 84 NW 2d 327, also quoting *MacQueen, supra*, at page 5 (84 NW 2d 329) and *Lansing District v State Board of Education, supra*.

(c) Historically the Michigan Legislature has prescribed that members of the boards of education of the various classifications of school districts be elected at large

In Michigan, in addition to a handful of school districts created by special acts of the legislature, known as special act school districts, there are 5 classifications of school districts, namely: primary school districts, fourth class school districts, third class school districts, second class school districts and first class school districts. The School Code of 1955, § 2; CL 1948, § 340.2; MSA § 15.3002. By statutory school census requirements, Detroit is the only first class school district and Grand Rapids and Flint are the only two second class school districts. The members of the boards of education of all 5 classifications of school districts are elected at large. This is recognized by District Judge Fox, in his dissent, when he said (254 F Supp 24, Jurisdictional Statement, Appendix B, p. 15a): "For even though members of local school districts are elected by popular election, the election of the 5 members of the Intermediate Board is by majority vote of the constituent school districts in the county, regardless of the respective populations of the several school districts."

(d) County (intermediate) school districts were first created in 1935, are state agencies distinct from the 5 classifications of school districts and did not supersede or replace such school districts

County (intermediate) school districts were first created by Act No. 117 of the Public Acts of Michigan of 1935, known as "the County School District Act" (CL 1948, § 388.171, et seq, MSA § 15.161, et seq).

Section 2 of the 1935 act (CL 1948, § 388.172; MSA § 15.162) specifically provided that:

> "Said county school district shall include all the territory of the county but it shall not supersede nor replace any of the school districts organized and operating under laws enforced at the time of the passage of this act, nor shall it control or otherwise interfere with the rights of said school districts, except as hereinafter provided in this act."

The statutory powers and duties of county (intermediate) school districts are set forth in full in Exhibits 1 and 3 of Appendix A, *infra*, pp. 18b-25b and are distinct from the powers and duties of constituent or local school districts of the classifications previously mentioned.

(e) In creating county boards of education, the Legislature, exercising its plenary power over education under the Constitution, did not provide for the popular election of members of the boards of education of such county school districts

In creating county school districts, the Legislature, acting under its plenary constitutional power, did not provide for the popular election of members of the boards of education of such county school districts. Rather, it was provided that the 5 members of each county board would be chosen at a meeting in the county of representatives from each of the constituent local school districts. The

statutory method of selecting board members is set forth in Appendix F to the Jurisdictional Statement, pp. 27a-30a. The Jurisdictional Statement does not mention that in 1962 the Legislature provided for a referendum on the popular election of members of intermediate boards of education. Act No. 190 of the Public Acts of 1962, effective March 28, 1963, as amended by Act No. 290 PA 1964 and Act No. 52 PA 1965 (§§ 294b through 294h, CL 1948 340.294b, et seq; MSA § 15.3294 (2), et seq.

(f) A Michigan school elector does not have an absolute right to vote for members of county (intermediate) boards of education and the Legislature is the only body which can give such right

In the recent 1962 case of *Lansing District v State Board of Education, supra,* a transfer of territory between school districts was involved and one of the questions presented was the following (367 Mich. 594, 116 NW 2d 868):

> "3. Is section 461 of the school code unconstitutional as denying to plaintiff the equal protection of the laws, in that it grants a vote on the question of transfer of territory to the districts from which detachment is made, while denying a vote to the district to which the territory is transferred?"

In disposing of this question, Mr. Justice Kavanagh (now Chief Justice), writing for a unanimous court, held (367 Mich 599, 116 NW 2d 870):

> "The third question raised by plaintiff school district is whether section 461 of the school code of 1955 is unconstitutional as denying to plaintiff the equal protection of the laws in that it grants a vote on the question of transfer of territory to the district from which detachment is made, while denying a vote to the district to which the territory is transferred.
>
> "Plaintiff does not question that the authority to alter boundaries may be delegated without the consent of the inhabitants of the territory annexed or the

municipality to which it is annexed, or even against its express protest. Its claim is that to deny one district a vote with reference to the transfer and permit a vote in the other district is to deny the equal protection of the laws contrary to the provisions of both the State and Federal Constitutions. These objections have been disposed of against plaintiff's contention by the following decisions, which we content ourselves with citing: *Hunter v City of Pittsburgh*, 207 US 161 (28 S Ct 40, 52 L ed 151); *Attorney General, ex rel Battishill, v Springwells Township Board*, 143 Mich 523.

"In order to deny the eqnal protection of the laws contrary to the provisions of the State and Federal Constitutions, it would be necessary for the electors in plaintiff school district to have an absolute right to vote on the annexation question. The above mentioned decisions clearly indicate they do not have such a right. The legislature is the only body that could give plaintiff school district such a right. This it has omitted. Not being entitled to the right, the fact that it is given to one district and not to the other does not deny the equal protection of the laws contrary to the provisions of the State and Federal Constitutions."

The Michigan Legislature has not given the individual appellants the absolute right to vote for members of county (intermediate) boards of education. The legislature is the only body that could give appellants such right. This having been omitted, the individual appellants are not entitled to the right.

At least since *Belles, supra,* it has been the law of Michigan that the legislature, under the various Constitutions of Michigan, has plenary power to determine how school board members should be chosen and upon what matters school electors could vote. Whether a school elector has or has not the right to vote for members of a county (intermediate) school district is of State concern only.

(g) The statutes and cases cited and relied upon by appellant do not sustain the jurisdiction of this Court to review the judgment on appeal

Appellees contend that the statutes and cases cited and relied upon by appellants in their Jurisdictional Statement, at page 2a, do not sustain the jurisdiction of this Court to review the judgment on appeal in this case.

Appellants claim jurisdiction under 42 USC §§ 1981, 1983 and 28 USC §§ 1331, 1343 (Jurisdictional Statement, p. 2).

42 USC § 1981 secures to "all persons" the same rights "enjoyed by white citizens" and has no application, because no racial issue is involved in this case.

42 USC § 1983 provides civil action for the deprivation of rights, privileges, or immunities secured by the Constitution and laws of the United States.

28 USC § 1331(a) grants original jurisdiction to the district courts of civil actions arising "under the Constitution, laws, or treaties of the United States."

28 USC § 1343(4) is the so-called civil rights and elective franchise provision of the Civil Rights Act of 1948 as amended in 1954 and 1957.

Nixon v Herndon, 273 US 536, 71 L ed 759, 47 S Ct 446; *Smiley v Holm*, 285 US 355, 76 L ed 795, 52 S Ct 397; *United States v Classic*, 313 US 299, 85 L ed 1368, 61 S Ct 1031 and *United States v Saylor*, 322 US 385, 88 L ed 1341, 64 S Ct 1101 have no relevancy to the case at bar.

Baker v Carr, 369 US 186, 7 L ed 2d 663, 82 S Ct 691, held that alleged malapportionment of a state legislature was justiciable and that plaintiffs-appellants, being qualified to vote for members of the Tennessee legislature, had standing.

Mr. Justice Douglas, in his concurring opinion, stated (369 US 247, 7 L ed 2d 703, 81 S Ct 726):

> "The right to vote in both federal and state elections was protected by the judiciary long before that right

received the explicit protection it is now accorded by § 1343(4). Discrimination against a voter on account of race has been penalized (Ex parte Yarbrough, 110 US 651, 28 L ed 274, 4 S Ct 152) or struck down. Nixon v Herndon, 273 US 536, 71 L ed 759, 47 S Ct 446; Smith v Allwright, 321 US 649, 88 L ed 987, 64 S Ct 757, 151 ALR 1110; Terry v Adams, 345 US 461, 97 L ed 1152, 73 S Ct 809. Fraudulent acts that dilute the votes of some have long been held to be within judicial cognizance. Ex parte Siebold, 100 US 371, 25 L ed 717. The 'right to have one's vote counted' whatever his race or nationality or creed was held in United States v Mosley, 238 US 383, 386, 59 L ed 1355, 1356, 35 S Ct 904, to be 'as open to protection by Congress as the right to put a ballot in a box'. See also United States v Classic, supra (313 US 324, 325); United States v Saylor, 322 US 385, 88 L ed 1341, 64 S Ct 1101."

We do not question the absolute right of a qualified voter to vote in both Federal and State elections and to have his vote counted without dilution and that such right should be protected by the judiciary, whether Federal or State. But in the context of this case, appellants had and have no right to vote.

In *Wesberry v Sanders*, 376 US 1, 11 L ed 2d 481, 84 S Ct 526, a Georgia statute apportioned congressional districts on a geographical basis. Appellants brought suit as citizens and qualified voters of Fulton County and entitled to vote in congressional elections in Georgia's Fifth Congressional District, claiming malapportionment of congressional districts throughout the State. The Court held that in congressional elections the equal protection clause of the Federal Constitution forbids either the weighting of the votes of residents of one part of the state more heavily than those residents in another part of the state, or accomplishing the same dilution of votes through a device of districts containing widely varied numbers of inhabitants. The decision in *Wesberry* would be controlling here if the individual appellants had the right to vote for members of the county (intermediate) board of education

and if the Michigan statute weighted the votes of the individual appellants for members of the county (intermediate) board of education so that the votes of other residents in the county (intermediate) school district were weighted more heavily or if the Michigan statute accomplished the same dilution of the votes of the individual appellants through the device of districts containing widely varied numbers of inhababitants. Here none of the individual appellants had or have any right to vote.

Nor is the decision in *Gray v Sanders*, 372 US 368, 9 L ed 2d 821, 83 S Ct 801, persuasive for the reason that there the appellee was a qualified elector voting in a state-wide party primary for the nomination of candidates for U.S. Senator and other state-wide offices. After he cast his vote for such candidates, a Georgia statute required that his vote be counted for such offices and be given a weight based upon the county in which he resided. The court held that once the geographical unit, for which a state-wide public officer is to be chosen, is designated, every qualified voter who participates in the election must have an equal vote. Unlike *Gray*, none of the individual appellants participated in an election for members of a county (intermediate) board of education, because they did not have the right to vote.

This Court held in *Reynolds v Sims*, supra, that persons voting for members of the legislature could not have their votes weighted differently according to where they happened to reside without offending the equal protection clause of the United States Constitution. It must be stressed that the original plaintiffs had the right to vote for members of the Alabama legislature. Such holding is not applicable here because none of the individual appellants has a right conferred either by the Michigan Constitution or statutes to vote for members of the county (intermediate) board of education.

WMCA v. Lomenzo, 377 US 633, 12 L ed 2d 568, 84 S Ct 1418; *Davis v Mann*, 377 US 678, 12 L ed 2d 609, 84 S Ct 1453; *Roman v Sincock*, 377 US 695, 12 L ed 2d 620, 84 S Ct 1462; and *Lucas v Colorado General Assembly*, 377

US 713, 12 L ed 2d 632, 84 S Ct 1472, follow and apply *Reynolds*.

The question presented on this appeal is so unsubstantial as to need no further argument.

Appellees urge that the appeal be dismissed, or, in the alternative, that the judgment of the District Court be affirmed, because of appellants' lack of standing or because no Federal question is presented.

III

The transfer of territory to appellee Kentwood Public Schools should stand

Should the Court note probable jurisdiction, appellees urge the Court to affirm the unanimous decision of the District Court allowing the transfer of territory to appellee Kentwood Public Schools to stand.

The transferred territory was originally a part of the Kentwood school district and only became a part of the Grand Rapids school district by operation of law, *supra*, pp. 3 and 4. The county board of education transferred the territory back to Kentwood and the State Board of Education on appeal set aside the action of the county board and entered its own order transferring somewhat less of the territory to Kentwood, *supra*, pp. 5 and 6.

The four members of the State Board of Education were elected at large by the people of the State. The State Board of Education is not a party to this litigation, *supra*, p. 5.

The transferred territory has a tax base of over five million dollars and a modern, 14-classroom elementary school is located thereon, *supra*, pp. 3, 4 and 13b.

Appellees argued before the District Court that even if the county board of education was malapportioned, the act of the county board was that of a *de facto* body and valid. Appendix B, p. 28b (14).

Judge Fox held (254 F Supp 26; Jurisdictional Statement, App. B, p. 20a):

> "Following the well established principle that acts of a *de facto* body have full legal effect, the Court is not disposed to grant plaintiffs this facet of the relief they seek. The possible harm in setting a precedent of this sort, even on the facts of this case, is viewed as more to be shunned than the harm resulting to individual plaintiffs by allowing the transfer to stand. Orderly functioning of government demands no less. See Johnson v Genesee County, 232 F Supp 567 (E.D. Mich, 1964); Scholle v Hare, 367 Mich 176, 116 NW 2d 350; Williams v Secretary of State, 154 Mich 447, 108 NW 749; and State v Sylvester, Supra.
>
> "The preferable course is to allow a properly apportioned body to remedy whatever ills have come about by acts of its malapportioned state, and this is the policy which this court will follow."

Judges O'Sullivan and Kent concurred with Judge Fox, holding (254 F Supp 28, Jurisdictional Statement, App. A, p. 1a):

> "We find ourselves in a position where we concur with Judge Fox, writing for the Court, in reaching the conclusion that this Court will not overturn the acts of the de facto Kent Intermediate Board."

The transfer to Kentwood Public Schools should stand.

RELIEF SOUGHT

Appellees urge the Court to dismiss the appeal, or, in the alternative, to affirm the judgment of the District Court, on the grounds that appellants have no standing to invoke the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and it is manifest that the question on which the decision of the cause

depends is so unsubstantial as not to need further argument.

Should the Court note probable jurisdiction, then appellees urge that:

1. The Board of Education of the City of Grand Rapids be dropped as an appellant on the ground it has no standing on the appeal; and

2. The Court affirm the unanimous decision of the District Court allowing the transfer of territory to appellee Kentwood Public Schools to stand.

September 26, 1966.

Respectfully submitted,

ROBERT A. DERENGOSKI
Solicitor General of the State of Michigan on Behalf of Appellee Frank J. Kelley, Attorney General of the State of Michigan
The Capitol
Lansing, Michigan 48902

EUGENE KRASICKY
Assist. Attorney General on Behalf of Appellee Frank J. Kelley, Attorney General of the State of Michigan
The Capitol
Lansing, Michigan 48902

PAUL O. STRAWHECKER
Attorney for Appellee Kentwood Public Schools
740 Old Kent Building
One Vandenberg Center
Grand Rapids, Michigan 49502

GEORGE R. COOK
Attorney for Appellee Board of Education of the County of Kent and the Individual Appellees
Suite 111-G, Waters Bldg.
Grand Rapids, Michigan 49502